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In the

Supreme Court of the United States

October Term, 1977

No. 76-1650

ALBERT OHRALIK,
Appellant,

v.

OHIO STATE BAR ASSOCIATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

The appellant Albert Ohralik prays that this Court, upon a full review of the arguments and of the record, reverse the judgment of the Supreme Court of Ohio indefinitely suspending appellant from the practice of law in Ohio, and that this Court declare that said judgment impermissibly invades appellant's rights of free speech and discussion as guaranteed by the First Amendment of the Constitution of the United States.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio, entered on December 15, 1976, is reported at 48 Ohio St.2d 217 and at 357 N.E.2d 1097. It is reproduced in Appendix A of the jurisdictional statement filed herein, p. 1a.*

The findings of fact and recommendations of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, dated May 18, 1976, are not reported. They are reprinted in Appendix B of the jurisdictional statement filed herein, p. 11a.

JURISDICTION

The judgment of the Supreme Court of Ohio, ordering appellant indefinitely suspended from the practice of law in Ohio, was entered on December 15, 1976. A timely motion for rehearing was entertained and denied on February 24, 1977. See p. 7a of Appendix A of the jurisdictional statement.

A so-called supplementary notice of appeal to this Court[1] was filed in the Supreme Court of Ohio on March 21, 1977. See p. 8a of Appendix A of the jurisdictional statement.

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* References herein to "App. __" are to the printed Appendix being filed simultaneously herewith. References herein to "J.S.App. — " or to "Appendix A" or "Appendix B" are to the printed appendices at the end of the jurisdictional statement. "Tr. __" relates to the pages of the transcript of the hearing before the Board of Commissioners that have not been reprinted in the Appendix.

[1] An earlier and premature notice of appeal had been filed on January 4, 1977, prior to action on the petition for rehearing by the Supreme Court of Ohio. App. 2a.

The appeal was docketed in this Court in timely fashion on May 24, 1977, and probable jurisdiction was noted by this Court on October 3, 1977.

The jurisdiction of this Court rests on 28 U.S.C. §1257 (2).

QUESTION PRESENTED

Whether DR 2-103(A) and DR 2-104(A) of the Ohio Code of Professional Responsibility are violative of the Free Speech Clause of the First Amendment of the Constitution of the United States when applied to suspend a lawyer indefinitely from the practice of law for having orally solicited his legal services with respect to two acquaintances injured in the same automobile accident, there being no claim or finding of misrepresentation, overreaching, fraud, encouraging of false claims, repeated acts of solicitation, or other activity impinging on the public interest or on the interests of the clients.

CONSTITUTIONAL PROVISIONS AND RULES

First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech . . .

DR 2-103(A), Ohio Code of Professional Responsibility:[2]

A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to

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[2] The entire Ohio Code of Professional Responsibility appears as a preface in 23 Ohio St.2d. Certain amendments to DR 2-103 and DR 2-104, not here relevant, were made in 1976 and appear in 44 Ohio St.2d xxi. The Code is promulgated by the Supreme Court of Ohio.

a non-lawyer who has not sought his advice regarding employment of a lawyer.

DR 2-104(A), Ohio Code of Professional Responsibility:

A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

* * * * * * *

RAISING THE FEDERAL QUESTION

Appellant initially raised the federal constitutional issue now before this Court in his answer to the complaint filed before the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. That answer, filed on October 9,1975, asserted "that DR 2-103(A) and DR 2-104(A) of the Code of Professional Responsibility are unconstitutional since they deprive respondent of the rights of free speech as guaranteed to respondent by the First Amendment of the Constitution of the United States." App. 5a. That same federal constitutional claim also formed a basis for appellant's motion to dismiss the complaint, filed before the Board of Commissioners on November 17, 1975. App. 6a. The Board found this claim to be "without merit" and overruled the motion to dismiss. See p. 15a of Appendix B of the jurisdictional statement.

The First Amendment claim was reiterated and pursued by appellant before the Supreme Court of Ohio. There

he renewed his motion to dismiss the proceedings "on the ground that DR 2-103(A) and DR 2-104(A) are unconstitutional for the reason that they deprive respondent of free speech as guaranteed by the United States and Ohio Constitutions." See p. 4a of the opinion below, Appendix A of the jurisdictional statement. The Ohio court overruled this renewed motion to dismiss on September 17, 1976, making mention of that action in its opinion. *Ibid.*, and see App. 2a. The court thus considered and expressly rejected the federal constitutional claim.

STATEMENT OF THE CASE

A. Preliminary considerations

Because First Amendment rights have allegedly been infringed in this case, this Court must carefully review the evidence in the record to determine whether such evidence can constitutionally support a judgment suspending the appellant from the practice of law. See *Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971); *Jacobellis v. Ohio*, 378 U.S. 184, 189 (1964); *Napue v. Illinois*, 360 U.S. 264, 271-272 (1959). Thus, while the facts as found by the Board of Commissioners and by the Supreme Court of Ohio are entitled to significant weight, those findings are not the necessary equivalent of the factual assessments that this Court must independently reach. This Court remains free to ferret facts from the record that may differ from or add to those found below and that may be relevant to executing the constitutional task in this case. This statement of the case has accordingly been constructed to assist the Court in this respect, making due note of any differences between the findings below and the facts of record.

At the same time, it must be emphasized that appellant does not suggest that this Court relitigate and resolve all the contested issues of fact. Indeed, there are but few differences between the parties as to the basic facts in this case. For the most part, the facts as found by the Board of Commissioners (J.S.App. 12a-15a), and repeated almost word for word by the Supreme Court of Ohio (J.S. App. 1a-2a), fairly track the course of relevant events. Yet there are certain facts, relevant to the First Amendment claim, that the findings below either misstate or omit. Such facts, identified hereinafter, are to be found (1) in the testimony at the hearing before the Board of Commissioners, or (2) in the tape recordings that the appellant made of his conversations with the parents of one of his clients and with the other client herself.

A few preliminary words are also in order with respect to the taped conversations. There probably has never been a disciplinary case involving oral solicitation of legal business where most if not all of the alleged solicitation has been tape recorded. These conversations were recorded by appellant only after he had reason to believe, from his hospital room conversation with Carol McClintock, that he would likely be retained to represent her. The ensuing conversations with her parents, who confirmed the employment of appellant to represent Carol (App. 108a, 112a), and with Wanda Lou Holbert, the guest passenger in Carol's car at the time of the accident, were taped with the thought that it was time to begin collecting his evidentiary "work papers" if Carol really "wants me to go to work" (App. 93a). And in interviewing clients and witnesses, appellant frequently found that he could not "take all the information down fast enough." App. 83a. Hence, on such occasions he was prone to record the informational sessions on tape, as he did here.

The cassette tapes themselves are part of the certified record before this Court, and for the Court's convenience they may be listened to on any cassette tape recorder. Appellant's own transcriptions of those tapes were also submitted below and made a part of the certified record; they are reproduced in full at App. 92a-130a. The tapes and the transcripts were both made part of the record by stipulation. Tr. 8-9, 40. No question was raised and no finding was made reflecting on the authenticity, the accuracy or the virtual completeness of the tapes.[3] See App. 54a-56a, 58a-59a.

B. The relevant facts

The facts relevant to the constitutional inquiry in this case may be summarized as follows:

(1) In September of 1975, the appellee Ohio State Bar Association filed a complaint with the Board of Commissioners on Grievances and Discipline against the appellant. See App. 3a-4a. The complaint alleged that the appellant, known below as the Respondent, was guilty of the following misconduct:

> On or about February 13, 1974[4] Respondent learned that Carol McClintock and Wanda Lou

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[3] The appellant affirmed that the tapes contained essentially all the conversations, save for the amenities of "hello and goodbye." App. 79a.

[4] The complaint inaccurately implies that February 13, 1974, was the date on which appellant first learned that Carol and Wanda Lou had been injured in an automobile accident. That inaccuracy is repeated in the findings of fact below, leaving the implication that

(continued)

Holbert of Chardon, Ohio, had been injured in an automobile accident. He then contacted Albert and Helen McClintock, the parents of Carol McClintock. Upon being informed that Carol McClintock was in the hospital, Respondent went to see her and advised her as to her legal rights. She thereupon employed Respondent to represent her as to her claims arising out of the accident.

On or about February 13, 1974, Respondent also went to the home of Wanda Lou Holbert and interviewed her regarding the accident. During such interview, Respondent advised Wanda Lou Holbert that she had a good claim for recovery for her injuries as a result of the accident and offered his services as an attorney to represent her. She thereupon employed Respondent.

Relator says that Respondent has violated DR-2-103(A) and DR 2-104(A) of the Code of Professional Responsibility

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[4] (continued)
appellant was an "ambulance chaser" and had dashed to the hospital on February 13 to solicit Carol as soon as he had heard of the accident. See J.S.App. 1a, 12a.

Actually, the accident occurred on February 2, 1974, some 10 days earlier. According to the appellant, who was the only person in a position to know, he first heard of the accident on the 4th or 5th of February. App. 49a. He was reminded of the accident again on February 13 by Fred Hoffman, the brother of the postmaster. App. 50a. The only contrary testimony was the hearsay statement by Mrs. McClintock, Carol's mother, that she understood "from the postmaster or somebody" that appellant had "learned about" the accident on February 13. Tr. 170. See pp. 10-12, *infra*.

(2) For many years preceding the events of 1974, appellant had been a prominent and esteemed attorney in a small township known as Montville, Ohio, maintaining a law practice both there and in Cleveland. App. 69a. He had an "attorney at law" placard in front of his Montville house, and had been active politically in the community. App. 62a, 72a. The findings of fact below (J.S. App. 1a-2a, 12a), while reflecting Carol McClintock's testimony (App. 36a) that she had not known appellant was a lawyer until he visited her in the hospital on February 13, acknowledged but did not resolve appellant's contrary testimony "that Carol must have been aware that he was a practicing lawyer because, among other things, he had been a candidate for public office and the fact was evident from his campaign literature" (J.S. App. 2a), and he "had displayed political campaign posters in his yard situated a mere mile from Carol's home" (J.S. App. 12a).

(3) Moreover, since 1968, appellant had maintained a mailbox in the Montville postoffice, which he often visited twice a day to pick up his mail. On those visits, while waiting for the mail to be distributed, he frequently saw and talked to Carol McClintock – perhaps two or three times a week. App. 50a.[5] Carol acknowledged that she had met appellant on these many occasions at the postoffice. App. 36a-38a. And the findings below stated that she "admitted to a casual acquaintanceship with him, which began with her visits to the Montville Post Office to pick up the family mail, and which was limited to a

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[5] When asked what his conversations were with Carol, appellant testified: "O, we would ask how was school, how is your boyfriend, what social functions are currently going on now, things like that. Just what was new in the life of a teenager." App. 50a. He also testified that it seemed that he met Carol more frequently than anyone else while waiting for the mail to be distributed. App. 49a.

customary exchange of greetings on such occasions." J.S. App. 1a-2a, 12a.[6] He had first met Carol in this fashion about four or five years prior to her 1974 accident. App. 50a. Appellant further testified that he also had met and become acquainted with Wanda Lou Holbert at these local postoffice gatherings, though he "didn't see her nearly as much" as he had seen Carol McClintock. App. 68a. Based upon this testimony, the findings below stated that Carol and Wanda "were, if anything, casual acquaintances" of the appellant. J.S. App. 1a, 12a. Neither was found to have been a relative or former client.

(4) On Saturday, February 2, 1974, Carol McClintock and Wanda Lou Holbert were seriously injured in an automobile accident. The McClintock automobile, which Carol drove with Wanda as her guest, was hit by another automobile driven by what turned out to be an uninsured motorist. Appellant gave the following uncontradicted testimony as to how he first became aware of this event (App. 49a, Tr. 177-178):

> Q. Calling your attention now to this accident of February 2, '74, will you tell us how you first became acquainted with this particular accident?
>
> A. Fred Hoffman told me about it. He is a brother of the Postmaster and he saw me in the post office.
>
> Q. The post office where?

---

[6] The findings further stated that Carol "also knew that her father had purchased an automobile" from Ohralik a number of years earlier. She also testified that the McClintock family had bought Christmas trees from Ohralik. App. 36a.

> A. Montville, Ohio.
>
> Q. What day?
>
> A. Oh, either the 4th or the 5th of February. It was a Monday or Tuesday.
>
> Q. '74?
>
> A. Of 1974.
>
> Q. And this particular accident or incident we are talking about occurred on February 2nd of '74; is that right?
>
> A. That's correct, yes.

There was, of course, no claim and no evidence that the appellant tried to contact either victim of the accident prior to February 13, 1977, some eleven days after the accident. The only testimony that could be construed as indicating that appellant did not learn of the accident until the morning of February 13, when he first visited Carol in the hospital, was plainly incompetent and speculative. In response to an unrelated question, Mrs. Helen McClintock (Carol's mother) volunteered the following bit of conjectural hearsay (Tr. 170):

> It was about somewhere between 11 and 13 days after Carol's accident that he [appellant] finally went down to see her and he learned about it. I understand that from the postmaster or somebody down there in Montville.

Mrs. McClintock was in no position to know when appellant first heard about the accident. Yet, without specific reference to Mrs. McClintock's hearsay statement or to

any other testimony, the findings below (J.A. App. 1a, 12a) commence with the following erroneous and unsubstantiated statements:

> Most of the material events involved in this case occurred on or about February 13, 1974. In the early monring of that day, while at the Montville, Ohio, Post Office, respondent [Ohralik] learned from the postmaster's brother that Carol McClintock, of Montville, and Wanda Lou Holbert, of Chardon, had been involved in a serious automobile accident. . . . Upon learning of the accident, which had occurred on February 2, 1974, respondent telephoned Carol's mother, obtained her consent to visit Carol at the hospital, and, later that day, proceeded to the hospital where Carol was undergoing treatment for the injuries sustained in the accident.

Thus the findings below, like the complaint first leveled against the appellant (see paragraph (1), note 4, above), are without any credible record support in their effort to portray appellant as an "ambulance chaser," eager to dash to the hospital to solicit business as soon as he hears of an accident.

(5) It may well be that the aforesaid findings reflect a certain amount of confusion and misunderstanding about what did happen in the "early morning" of February 13. It is a fact that the fateful morning of February 13 started with a discussion between appellant and Fred Hoffman, the postmaster's brother, in the Montville postoffice. But it is also a fact – which seems to have escaped the fact finders below and which may have been lost in Mrs.

McClintock's retelling of her hearsay information – that this was the second discussion between appellant and Fred Hoffman concerning Carol's accident. The first occurred on February 4 or 5, when Hoffman first told appellant about the accident. And the second discussion occurred on the morning of February 13, some eleven days after the accident and some eight or nine days after appellant first learned of the accident. It was with reference to this second discussion on February 13 that appellant testified, without contradiction, as follows (App. 50a-51a, Tr. 179-180):

> Q. Now, after February 4th or 5th of '74, did anyone remind you that Carol McClintock had been involved in an accident?
>
> A. Yes. Fred Hoffman had brought it up on the 13th or he – I don't know. We made conversation on the 13th about her injury.
>
> Q. On February 13, '74, after your conversation with Fred Hoffman, did you do anything regarding Carol McClintock?
>
> A. Yes.
>
> Q. Go ahead.
>
> A. Yes, I spoke with my brother Carl who also lives there in the neighborhood, and I told him that Carol had apparently been disabled from her accident and, "I wonder if we ought not go visit her and cheer her up." He said, well, it would be nice, but he is committed that day and he couldn't make it.

Q. Did you visit Carol McClintock or did you do something before visiting her?

A. I did something before.

Q. What did you do?

A. I phoned her mother and I said that I heard Carol was banged up in an accident, and I wondered how serious it was and whether she was still confined, and she said yes, that she's in the hospital in Painesville, and so then I said "Gee," I said, "yes, I thought we could probably cheer her up." She says, "Isn't one of you an attorney?" I said, "Yes, both my bother and I are attorneys," but I said, "that is not why I am calling you. I just thought it would be a nice friendly thing to cheer her up," and that we are good friends.

The findings adopted by the Supreme Court of Ohio (J.S. App. 1a) serve to confirm appellant's account, stating that on February 13 he "telephoned Carol's mother, obtained her consent to visit Carol at the hospital, and, later that day, proceeded to the hospital where Carol was undergoing treatment for the injuries sustained in the accident."[7]

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[7] It is noteworthy that the Supreme Court did not adopt the Board of Commissioners' additional remark (J.S. App. 12a) that, after the February discussion with Fred Hoffman, appellant "concluded it would be a good thing to contact Carol" and "thereupon telephoned her parents."

Mrs. McClintock also confirmed appellant's account by testifying that appellant had called her that morning to inquire about Carol's condition, and "he wanted to know if he could go and see her, he might be of some help to her." Mrs. McClintock said to him in reply: "I don't know. You can go see her as far as I am concerned." App. 44a.

[8] According to appellant, Mrs. McClintock had asked him on the phone, "Are you going to go and visit her today?" When he replied, "Yes, I thought I would," Mrs. McClintock said, "Would you please stop at our house before you go." Appellant agreed to do so. App. 51a.

(6) While Mrs. McClintock testified that in this initial telephone call appellant broached the question whether Carol needed an attorney (App. 44a-45a), none of the findings below support that testimony, which differs widely from appellant's version of the conversation (App. 51a). What is clear, however, is that the appellant went to visit Mr. and Mrs. McClintock before he went to the hospital to see Carol (App. 45a, 51a).[8] He did not have his tape recorder with him on this visit, since he had no reason to believe that he would be retained to represent Carol (App. 52a). During this initial visit with the McClintocks, appellant found that "they were very worried that the Holberts might sue the McClintocks because the automobile that she [Wanda Lou Holbert] was injured in was owned by Mr. McClintock" (App. 52a). Appellant allayed their fears by explaining "the significance of the guest statute, and I told them they really probably had nothing to worry about on the basis of the guest statute, and I told them that most likely there was no negligence on the part of Carol anyway" (App. 52a). According to Mrs. McClintock, on this visit appellant "talked about the accident, and he more or less was looking at the insurance papers . . . and wrote a bunch of stuff down" (App. 46a).

(7) From the McClintocks' house, appellant drove directly to the hospital in Painesville to visit Carol, again without his tape recorder. Appellant "commiserated with her on how she was trussed up with pulleys and how confining it was, and then she brought up in the conversation that some hospital administrator was urging a lawyer upon her, and I chuckled and I said, 'Yes, this certainly is a case that would entice a lawyer. That would interest him a great deal' " (App. 53a). Carol's version of this visit, which was not reflected in any of the findings below, was that appellant "came into the hospital and told me that he was a lawyer and that he had talked to my mom and dad; and they called me and said that he had been to the house and that he wanted to come up and talk to me; and that he came up – well, he came up to the hospital and said he was a lawyer and that he had heard at the Post Office that I had been in a car accident and that I would need a lawyer" (App. 31a). She added that appellant "said that my bed was by a window overlooking the emergency entrance to the hospital when the ambulances came in, and that he had cards with him, and he said that I could chase ambulances for him, and he gave me some cards" (App. 31a). Obviously, the fact finders below gave no credence to this fanciful account of how a young girl in traction, and heavily trussed, was importuned to distribute appellant's professional cards to those arriving at the hospital by ambulance.

(8) The precise manner in which the subject of appellant being retained to represent Carol arose during this hospital room visit is not revealed by the record. But the subject did arise. And appellant was left with the impression that Carol was interested in having him represent her.

As he left the room,[9] Carol asked him to tell her parents to call on her to discuss the matter further. App. 56a. But whatever the extent of the discussion of this matter, it is clear that no written or oral agreement of representation was reached between appellant and Carol on this hospital visit. App. 53a. According to Carol herself, she "wanted to talk to my mom and dad first" (App. 32a) before entering into any such arrangement, which accounts for her request that appellant ask her parents to call on her. Such evidence, of course, undermines the finding below (J.S. App. 2a, 13a) that appellant "obtained Carol's consent to handle the claim" during this hospital visit.

(9) Acting in part to convey Carol's request to her parents, the appellant, upon leaving the hospital, "drove to he home of Carol's parents, where he examined their automobile liability policy, discussed the law applicable to passenger guests, and obtained the address and directions to the home of Wanda Lou Holbert, a passenger in the automobile driven by Carol McClintock." Findings below, J.S. App. 2a, 13a. But in the belief that he would likely be retained to represent Carol and thus should begin to collect the evidence necessary to pursue her claim, appellant stopped at his own home to pick up his tape recorder before arriving at the McClintocks' house for the second time on February 13. App. 54a. Thus the entire conversation with the McClintocks on this second visit has been preserved through the tapes, which are transcribed at App.

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[9] It was found below that appellant reviewed "with Carol the legal merits of her cause and the need for proper representation." J.S. App. 2a, 13a. No evidence was cited in support of that finding.

92a-117a. The major portion of that conversation, as the findings indicate, concerned the scope and nature of the McClintocks' automobile liability policy and the law applicable to passenger guests – matters which were of great concern to the McClintocks and as to which they were in need of legal advice. Appellant freely gave his legal advice to the McClintocks. And it was he who discovered that their policy with the Lightning Rod Mutual Insurance Co. included coverage of "$12,500 each person and $25,000 each accident" when injury was caused by an uninsured motorist. App. 95a. That coverage proved to be the basis upon which appellant was later to secure a full $12,500 benefit for Carol.

(10) The taped conversation with the McClintocks further reveals that, between the time when appellant left the hospital and his arrival at the McClintocks, Carol had phoned her parents, who agreed with her that appellant should be retained to represent her interests. The following conversation occurred in this connection (App. 108a):

> Ohralik: Mrs. McClintock, Carol had asked me to ask you folks to visit her tonight to talk with her, but Mr. McClintock thinks that she phoned you folks since then.
>
> Mrs. McClintock: Yes she did.
>
> Ohralik: I see.
>
> Mrs. McClintock: She said tell you to go ahead with it.
>
> Ohralik: All right, fine. I'll certainly do that..

And at a later point in the conversation, Mrs. McClintock reaffirmed that "you can tell them you're representing Carol" and that "[y]ou can do whatever you want to do." App. 112a. Thus Carol, having discussed the matter with her parents and using them as her agents, entered into an oral understanding with appellant to represent her – which further confirms the fact that no such understanding had been reached in the hospital room. And two days later, on February 15, this oral understanding was translated into a written agreement – as Carol testified (App. 32a) – in which appellant agreed to represent her for the usual one-third contingency fee. That agreement was signed by Carol in her hospital room, following a further discussion of the matter with appellant. App. 61a.

(11) Following his conversation with the McClintocks, appellant went to the home of Wanda Lou Holbert, who had recently returned from a hospital confinement. He received directions as to how to reach her home from the McClintocks. App. 95a. He went to the Holbert home for the purpose of interviewing her as "a witness to the cause of the accident and the circumstances surrounding the accident . . . [and not] for the purpose of soliciting her as a client." App. 58a. And in order to preserve whatever evidence she might be able to provide, appellant tape recorded his conversation with Wanda Lou. The transcription of that taped conversation appears at App. 118a-130a.

(12) The taped conversation with Wanda Lou was unable to provide any evidence as to the accident or its cause "because I hit my head on the dash" and thus was could remember nothing. App. 120a. But the appellant did tell her that he now represented Carol and that the McClintocks

had an uninsured motorist clause in their insurance policy that might be of benefit to Wanda. The critical portion of this conversation is as follows (App. 119a-120a):

> Ohralik: Then there is a policy that is kind of new. . . . They can go against their own company for up to $12,500.00, so we have a good claim, see, for up to $12,500.00, . . . in fact you have too, you know.
>
> Wanda: I do?
>
> Ohralik: Ya, you have a claim you have for money up to $12,500. So there is a little tip I'm telling you.
>
> • • • • •
>
> Ohralik: Are you going to file a claim on this, or . . .
>
> Wanda: I, ha, ha, ha, really don't know what's going on.
>
> Ohralik: Well, I could easily represent you as her if you want. I would be very happy to. What I do is, see it doesn't cost you anything. Just . . . anything we recover I get a third, see?
>
> Wanda: Uuh, Huh.
>
> Ohralik: If we get $3,000, I'd get one thousand, you'd get 2 thousand. And I could represent you just as well as them. See, it's the same kind of case – it's the

> same case. So, all you'd have to do is tell me it is O.K., and I would, I would represent you, if you want.
>
> Wanda: O.K.
>
> Ohralik: O.K.?
>
> Wanda: Unh Huh!
>
> Ohralik: And, let's see, we ought to get some information. Wanda, your address is what?

(13) The foregoing oral conversation constituted the only agreement ever made with respect to Wanda's desire to have appellant represent her on her claim under the McClintocks' insurance policy. No written agreement was ever made. The following morning, February 14, Wanda's mother attempted to repudiate the oral agreement; when the appellant called the Holbert home to talk further with Wanda, her mother answered the phone and informed appellant that "We talked it over and we don't want to sue nobody, and we don't want you as a lawyer." App. 24a. Appellant reportedly replied: "Well, Wanda is eighteen. She is her own boss and she can talk for herself. . . . [and when] Wanda gets to feeling better, I would like for her to call me back." App. 24a. Later, on March 14, Wanda herself wrote a letter to appellant, stating:

> I do not wish to sue anyone so, would you please contact anyone that you informed and tell them you are not my attorney, that is if you have told anyone. Thank you.

Prior to the receipt of this letter, appellant had made certain insurance demands on Wanda's behalf, but he never received or consummated any settlement offer for her.

(14) Appellant's relationships with Carol McClintock and her parents continued to be harmonious, and appellant pursued Carol's claim with vigor. The maximum recovery possible for her under the uninsured motorist coverage was $12,500. By April 11, appellant had sent the insurance carrier a demand that Carol be paid the maximum $12,500; and shortly thereafter, appellant received an acknowledgement from the carrier that her claim was indeed worth $12,500 and that this amount would be paid upon execution of the proper releases. Such releases were never executed, for on April 12, 1974, without prior warning, appellant received a communication from Carol discharging him as her attorney and demanding that he transfer his files to another attorney; she, as well as her new counsel, asserted that appellant's services were worthy of no compensation and that the requested releases would not be executed.

(15) As the findings below state (J.S. App. 3a, 14a), appellant insisted that he had valid binding agreements with both Carol and Wanda, which he demanded be performed. He in fact sued Carol on her signed agreement for the value of services rendered, and ultimately accepted a settelement in the amount of $4,166.66. As to Wanda, appellant abandoned his claim against her because of his belief that under the disciplinary rules an ethical question arises "if a contract has its origin in a controversy." But the Board of Commissioners noted (J.S. App. 14a) that no accusations or charges were leveled against appellant "for his conduct in clinging to the contracts of employment ob-

tained in the manner found above" and that there was, in any event, "insufficient evidence on which to base a finding that these activities, too, were violative of [appellant's] professional responsibilities." The Supreme Court expressed no disagreement with those conclusions of the Board of Commissioners.

(16) Finally, it should be noted that the Board of Commissioners found no evidence showing that appellant's "solicitation of Carol and Wanda Lou is part of an established or habitual course of conduct." Indeed, said the Board, "the only evidence of soliciting in the record is the pursuit of Wanda and Carol's causes." J.S. App. 14a. Here again, the Supreme Court of Ohio did not alter or disagree with such determinations.

The ensuing disciplinary proceeding stemmed from complaints registered by Carol McClintock and by Wanda Lou Holbert and her mother. See App. 24a-29a. The complaint signed by Wanda (Ex. 7) asserted that on February 13 appellant had come to her house "and asked me if he could be my attorney." In the words of her complaint: "I told him I would think about it. The next day he called me in the morning and I told him I did not want him. Thereafter, in spite of this, he told the insurance company and Bureau of Motor Vehicles that he was my attorney."

After a hearing before the Board of Commissioners, based upon these complaints, the Board concluded that the evidence "fully demonstrates" that appellant, in seeking and obtaining agreements from Wanda and Carol to represent them in their respective claims for damages arising

from the February 2 accident, "violated Disciplinary Rule 2-103A and 2-104A of the Code of Professional Responsibility." J.S. App. 15a. The Board accordingly recommended that appellant "be given a public reprimand." J.S. App. 15a.

On review, the Supreme Court of Ohio without explanation escalated the sanction from a public reprimand to an indefinite suspension from the practice of law.[10] And it added the comment that a "review of the record before us reflects ample, uncontraverted evidence supportive of the finding of the Board of Commissioners . . . that respondent, Albert Ohralik, violated DR 2-103(A) and DR 2-104(A)." See J.S. App. 4a. The court made no identification of the so-called "uncontroverted" evidence, much of which had been fully controverted by the appellant's testimony and by the taped conversations. And the court made no effort to distinguish as between DR 2-103(A) violations and DR 2-104(A) violations. The court did reiterate, of course, its ruling that appellant's solicitation of business was not "protected by the First and Fourteenth Amendments to the United States Constitution." J.S. App. 3a.

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[10] Under Ohio Supreme Court Rule XVIII(6), set forth in 176 Ohio St. at lv, an attorney may be disciplined in one of four ways: (1) permanent disbarment, which precludes any possibility of future readmission; (2) suspension for an indefinite period from the practice of law, subject to possible reinstatement after the lapse of at least two years; (3) public reprimand; and (4) private reprimand.

SUMMARY OF ARGUMENT

This appeal presents one of the problems left unresolved in the last Term's decision in *Bates v. State Bar of Arizona*, 433 U.S. ___, 97 S.Ct. 2691 – whether and to what extent the in-person solicitation of clients constitutes an exercise of First Amendment rights, and whether and to what extent the state may control and punish such solicitation.

The traditional view of the bar has been that all forms of solicitation are evil and should be deemed unethical. But this view is an overstatement of the history, the purposes and the rationale of the disciplinary rules governing solicitation. Unfortunately, however, the broadly-written rules can be interpreted and applied in a broad and indiscriminate manner – as has happened in this case.

This Court's decisions have recognized that some forms of solicitation do constitute an exercise of First Amendment rights, and that the state cannot limit or outlaw those rights merely by labeling them as "solicitation." Nor can the state, under the guise of prohibiting professional misconduct, ignore the constitutional rights implicit in the act of solicitation.

What is ultimately critical in the assessment of any attempt to punish solicitation is the presence of some compelling state interest, or some injury to the solicited client. That injury, that interest, must be something more than a reiteration of the professional disdain for all forms of solicitation. There must be some element of fraud, deception, misleading, coercion, duress, compulsion, intimidation, threat, overpersuasion, overreaching or vexatious conduct. Without some such compelling interest having been asserted and proved, the presumption must remain that the act of solicitation was an exercise of the lawyer's First Amendment rights.

In this case, appellant has been found in violation of DR 2-103(A) and DR 2-104(A) in that he did solicit and obtain agreements to represent two clients. He represented them well, and he achieved a full monetary recovery for one of the clients. The state has made no claim that he has done other than solicit and obtain agreements. No claim or finding has been made with respect to misrepresentation, fraud, coercion, overreaching, or the like. In such circumstances, the indiscriminate application of the blanket prohibitions of DR 2-103(A) and DR 2-104(A) against solicitation must be deemed to have violated appellant's rights to free speech, as guaranteed by the First Amendment.

ARGUMENT

On June 27, 1977, in *Bates v. State Bar of Arizona,* 433 U.S. ____, 97 S. Ct. 2691, this Court held that the First Amendment prohibits a blanket suppression of an attorney's truthful newspaper advertisement concerning the availability and terms of routine legal services. At issue there was the constitutional validity of the American Bar Association's Disciplinary Rule 2-101(B), which had been adopted by the Supreme Court of Arizona.

The instant appeal brings into issue a closely related problem – the constitutional validity of two other Disciplinary Rules suggested by the American Bar Association, DR 2-103(A) and DR 2-104(A), which have been adopted and promulgated by the Supreme Court of Ohio. Those two rules are here questioned in First Amendment terms insofar as they constitute a blanket suppression of an attorney's truthful oral solicitation of two individuals in need of legal advice and representation. This issue, of course, was expressly reserved in the *Bates* opinion, the majority stating (97 S. Ct. at 2700) that

> ". . . we also need not resolve the problems associated with in-person soliciation of clients – at the hospital room or the accident site, or in any other situation that breeds undue influence – by attorneys or their agents or 'runners.' Activities of that kind might well pose dangers of overreaching and misrepresentation not encountered in newspaper announcement advertising."

The present issue, in other words, is whether the free speech guaranteee of the First Amendment operates to vitiate a blanket and indiscriminate suppression of all

forms of oral solicitation by an individual lawyer. As will be seen, that issue is posed in the context of a situation, partly occurring in a hospital room of an accident victim, where no undue influence, no misrepresentation and no overreaching have been alleged or found. In the course of giving requested legal advice to acquaintances, an attorney has done no more than volunteer his services in pursuing legitimate insurance claims. Yet the Supreme Court of Ohio, without asserting any compelling state interest, has ruled that this kind of solicitation is *per se* unethical and that the First Amendment plays no role whatever in the application of DR 2-103(A) and DR 2-104(A) to the facts of this case.

It is appellant's position that the principles and the values implicit in the Free Speech Clause of the First Amendment render the Ohio ruling entirely unacceptable.

I. A BLANKET PROSCRIPTION OF ALL FORMS OF SOLICITATION, ABSENT A COMPELLING STATE INTEREST, IS NOT JUSTIFIED BY THE HISTORY, THE PURPOSES OR THE RATIONALE OF THE CURRENT RULES GOVERNING SOLICITATION.

The traditional view of the organized bar, as reflected in DR 2-103(A) and DR 2-104(A), has long been that solicitation, like advertising, is to be condemned as crass commercialization of the practice of law. That attitude is based in part on deeply ingrained feelings of tradition, honor and service, feelings that the promotion of justice, rather than the earning of fees, is the exclusive goal of the profession. See Drinker, *Legal Ethics* 210-212 (1953). But as was noted in *Bates*, 97 S. Ct. at 2703, since the belief that lawyers are somehow "above" the common trades has become an anachronism, "the historical foundation for the advertising restraint [and likewise the solicitation restraint] has crumbled."

The traditional viewpoint, moreover, has frequently ignored the needs of the multitudes of potential but untutored legal consumers, who often are ignorant of their legal rights or of the availability of competent lawyers to advise and to represent them in recognizing and implementing those rights. It is said that the public – including the untutored – would soon lose confidence in lawyers, the law and the courts if the bar were seen as merely another commercial enterprise. See Christensen, *Lawyers for People of Moderate Means: Some Problems of Availability of Legal Services* 151 (1970). The public interest and the public needs are somehow deemed better served if lawyers remain silent within their offices, unknown and unidentified to all but those who chance to hear of a particular attorney's availability and reputation. And it is often felt "that solicitation, with its emphasis on economic ends, may hamper the establishment of the proper attorney-client relationship." Note, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U. Chi. L. Rev. 674 (1958). No public interest, no professional goal, is thought to abide in apprising unsophisticated persons that they have a lawful claim and a right to redress, or in permitting such persons, along with the affluent, to have their rights legally assessed and adjudicated. Far better that they forego securing legal assistance, far better that they surrender their legal due, than that they lose their "confidence" in the aloof legal system.[11]

This broad and undifferentiated condemnation of such practices as solicitation is nowhere better illustrated than in this case. The Supreme Court of Ohio, in apparent

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[11] See, generally, Shuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 Geo. Wash. L. Rev. 244 (1968).

but silent reliance on the unalloyed public evil of solicitation, has given not the slightest indication of any compromise or any exception to the fullest possible application of the DR 2-103(A) and DR 2-104(A) proscriptions. As the Ohio court once put it,[12] solicitation of business by an attorney, if it does not constitute moral turpitude, "is universally condemned as a gross impropriety, unworthy of a member of the legal profession, and, when proved, makes him amenable to such discipline as the gravity of his offense demands."[13]

But such a limitless reading of the public and professional bans on solicitation is not truly required by a careful analysis of the history, the purposes and the articulated rationale of the "unethics" of solicitation. From its common law antecedents of barratry, champerty and maintenance down to the modern excesses of "ambulance chasing," the notion of solicitation has been given fairly defined limits. Much of the literature and many of the decided cases seek to confine the solicitation concept within the borders of definable and detectable injuries to the interests of the public, the client or even to the legal profession itself. And when no such injury has been discovered, at least grudging if not enthusiastic

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12 *In re McBride*, 164 Ohio St. 419, 132 N.E.2d 113, 117 (1956). Ohio is one of the states that has supplemented its disciplinary code condemnation of solicitation by making criminal virtually all forms of paid solicitation of legal business. Ohio Revised Code §§4705.08, 4705.99, discussed in Warren, *Solicitation of Legal Services – A Crime*, 22 Ohio St. L. J. 691 (1961). See also New York Judiciary Law §479, making it unlawful for any person, or his agent, to solicit or procure through solicitation any legal business.

13 See, generally, Luther, *Legal Ethics: The Problem of Solicitation*, 44 A.B.A.J. 554 (1958).

sanction has been accorded what would otherwise be blanketed under the broad, undifferentiated outlawry of solicitation.

Consider, for example, the justifications offered by responsible proponents of the solicitation ban. Leaving aside whatever general appeals they may make to professional and anti-commercialist ideals, these advocates invariably offer rationalizations that conceivably can be translated into specific cases where real evils or injuries are the products of solicitation:[14]

1. Stirring up litigation. It is frequently said that solicitation results in "stirring up litigation," though this idea has been slowly receding as realization grows that litigation often serves vital social functions.[15] But if the "stirring up litigation" phrase is traced to its antecedents in the medieval laws respecting barratry and champerty, which outlawed officious and commercialized intermeddling in another person's lawsuit,[16] then the modern anti-solicitation sanctions can be addressed to lawyers who actively and deliberately solicit harrassing or "malicious prosecution" type cases.

2. Bringing of fraudulent claims. It is also charged that solicitation breeds the institution of fraudulent claims. If an attorney is shown to have solicited a series of known

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14 See, e.g., Drinker, *Legal Ethics*, ch. VIII (1953); Luther, *Legal Ethics: The Problem of Solicitation*, 44 A.B.A.J. 554 (1958).

15 See Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 Yale L.J. 1181, 1188-1189 (1972).

16 Radin, *Maintenance by Champerty*, 24 Calif. L. Rev. 48 (1935), which explores the confusing history of maintenance and champerty and their relationship to "stirring up litigation."

fraudulent claims, this solicitation concept becomes more manageable and translatable into prevention of a real evil.

3. **Corruption of public officials.** Often it is claimed that a soliciting lawyer of the "ambulance chasing" type will pay doctors, hospital attendants and policemen for information about prospective clients. This is a narrow but significant evil that can properly be dealt with in individual cases where such an evil has been shown in fact to result from solicitation.[17]

4. **Injury to clients.** One of the major charges against solicitation is that it may harm the client where the solicitation is marked by overreaching, overcharging or misrepresentation as to the legal services to be provided. And solicitation that is superimposed upon the physically or mentally ill patient, or upon an accident victim unable to manage his legal affairs, obviously injures the best interests of such a client. Such injuries, where proved, serve to define specific types of solicitation that by any standard merit condemnation and professional sanctions.

The important point that emerges from those rationalizations, assuming they can be applied to prove specific instances of unethical solicitation, is that there are numerous remaining instances of solicitation where these specific evils are not involved. The instant case is one of them. And various courts have not hesitated to cover this "soft spot" in the solicitation syndrome by ruling that a given act of solicitation that contains none of these evil characteristics does not warrant professional or ethical condemnation.

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17 See the collection of "ambulance chasing" solicitation cases in the annotation in 67 ALR2d 859. See also Note, *Legal Ethics – Ambulance Chasing*, 30 N.Y.U.L. Rev. 182 (1955).

Thus in *Louisville Bar Assn. v. Hubbard*, 282 Ky. 734, 739-740, 139 S.W.2d 773, 775 (1940), it was recognized that, however much the profession may view the practice with disdain, "an attorney may personally solicit business with impunity, where he does not take advantage of the ignorance, or weakness, or suffering, or human frailties of the expected clients, and where no inducements are offered them." And in *Chreste v. Louisville Ry. Co.*, 167 Ky. 75, 83-84, 180 S.W. 49, 53 (1915), the same Kentucky court had voiced an earlier sentiment that is most pertinent to this modern day:

> There are many forms of solicitation. Some lawyers seek business by advertising in the newspapers; others by sending out announcement cards; others by asking friends to send them business; others by applying directly, or through the medium of friends, for employment by firms and corporations; others buy stock in corporations, with the understanding that they are to be employed as counsel; still others invite to their homes and frequently entertain those who are likely to require the services of an attorney. Doubtless many solicit business in person, or through young lawyers or agents employed for that purpose. Manifestly, if every kind of solicitation, regardless of the form it may take, is to be condemned, then only in rare instances would there be such a thing as a valid contract of employment between a lawyer and his client. If some forms are to be permitted, while others are to be condemned, where shall the line be drawn? . . . If it be

lawful for an attorney to send out announcement cards, or insert an advertisement in the newspaper, . . . how can it be said that if he solicits business in person, or by an agent, that the public interest will be so endangered that any contract obtained under such circumstances will be contrary to public policy? . . . But it must be remembered that there is a wide difference between what is undignified or unbecoming conduct on the part of the attorney and what is clearly contrary to public policy. Such conduct may be disapproved of by the courts and by those representatives of the profession who are concerned in seeing that its standards are never lowered, and, yet, it may fall far short of being so injurious to the interest of the public as to invalidate a contract of employment thus obtained . . . . the consequences that would follow the rule that mere solicitation is contrary to public policy would frequently be antagonistic to the public interest, in that it would prompt solvent firms or corporations to make unfair settlements, in the absence of counsel, in the hope that the fee of the attorney might be defeated by a plea that the contract of employment was obtained by solicitation.

To the same general effect, see *State v. Rubin*, 201 Wis. 30, 229 N.W. 36 (1930); *Hightower v. Detroit Edison Co.*, 262 Mich. 1, 247 N.W. 97 (1933); *In re McDonald*, 204 Minn. 677, 282 N.W. 677 (1938).

Thus the realities of the legal profession have forced the courts and the comentators away from a rigid and moralistic interpretation of the solicitation ban. There has never been, there is not, and there can never be a total, blanket condemnation of solicitation in all its manifold forms.[18] One need read no further than subparagraph (1) of DR 2-104(A) to realize that the codifiers of that rule have left the door wide open to a lawyer's personal solicitation of the legal business of "a close friend, relative, former client . . . or one whom the lawyer reasonably believes to be a client." Can it be, then, that the ethics of what this appellant did and the indefinite suspension that he has suffered all depend upon the closeness of his friendships with Carol McClintock and Wanda Lou Holbert? Had they been truly close friends, would appellant have been entirely free to solicit them as he did?

Perhaps the ultimate proof that the progenitors of the anti-solicitation rules are moving away from an overly-rigid formulation and application of the ban is afforded by one of the recent proposals of the American Bar Association for rewriting DR 2-104 (A) in the light of the *Bates* decision. In what is known as the Association's alternative Proposal B, a completely recast DR 2-104(A) has been circulated to the highest state courts for their consideration. See 46 Law Week 1 (Statute section, Aug. 23, 1977). This alternative proposal would cause DR 2-104(A) to read (46 Law Week at 12):

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18 See Freedman, *Lawyers' Ethics in an Adversary System* 112-125 (1975); Johnstone and Hopson, *Lawyers and their Work* 120-130 (1967); Rosenthal, *Lawyer and Client: Who's in Charge?* 135-141 (1974).

DR 2-104 Suggestion of Need of Legal Services.

(A) A lawyer who has given unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice if:

(1) The advice embodies or implies a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B); or that violates the regulations contained in DR 2-101(C); or

(2) The advice involves the use by the lawyer of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct.

Had that proposal been in effect in Ohio at the time of appellant's activities in 1974, he could not have been charged with violations of DR 2-104(A) – for there never was any suggestion or claim that he was guilty of making false, fraudulent or misleading statements to Carol or Wanda or of engaging in any coercive or threatening actions with respect to them. Nor was there any evidence or assertion that he had been overpersuasive, overreaching or harassing. And had this proposal been in effect in Ohio in 1974, this Court would not now be confronted with the task of assessing the constitutionality of the present version of DR 2-104(A). But whatever might or might not have been, the fact remains that the proposed rewriting of this rule in and of itself reflects a dramatic shift in the traditional attitude of the bar toward oral solicitation of legal business.

II. THE LAWYER'S CONSTITUTIONAL RIGHT OF FREE SPEECH EXTENDS TO THOSE ACTS OF SOLICITATION THAT DO NOT IN FACT IMPINGE UPON SOME COMPELLING INTEREST OF THE PUBLIC OR OF THE CLIENT.

The foregoing discussion as to the nature of the professional attitude toward solicitation serves as a prelude to the constitutional analysis compelled by a blanket and indiscriminate application of DR 2-103(A) and DR 2-104(A). Indeed, it is fair to say that the types of solicitation that do no more than offend the professional feelings of tradition and honor are invariably the situations where the acts of solicitation become entitled to protection under the free speech clause of the First Amendment.

As a general proposition, lawyers are as entitled to First Amendment protections as anyone else. Whether their speech or communication be personal, political, professional or commercial, they are presumptively entitled to the full sweep of First Amendment freedoms in their professional activities. Commercial speech is now firmly embedded in the rock of the First Amendment. *Bates v. State Bar of Arizona*, 97 S.Ct. at 2698-2700; and see *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 761-768 (1976).

The lawyer's entitlement to the protection of the First Amendment in his daily chores is not easily dislodged. It is not enough, to deprive him of such protection, merely to pin the label of "solicitation" on what he had done or said. As the decision of this Court in *N.A.A.C.P. v. Button*, 371 U.S. 415, 429 (1963), makes clear, "a state cannot foreclose the exercise of constitutional rights by mere labels." Nor can a state, "under the guise of prohibiting professional misconduct, ignore constitutional rights."

Ibid., 439. And by placing solicitation within the area of First Amendment freedoms, *Button* conditions its control and regulation upon the presence of some "compelling state interest in the regulation of a subject within the State's constitutional power to regulate." *Ibid.*, 438.

And so the constitutional problem in the application of the generalized solicitation precepts of DR 2-103(A) and DR 2-104(A) becomes one of determining, in a given case, whether the acts of solicitation impinge upon some recognized and compelling public interest or inflict some real injury upon the interests of the solicited client. If, in a specific case of solicitation, the state can offer no greater justification for interference than its concern in promoting professional ethics, or its association with the traditional and professional disdain for any and all forms of solicitation, two things then become evident: (1) the state has failed to demonstrate a compelling interest in outlawing or penalizing the acts of solicitation; and (2) the acts of solicitation must remain within the protected area of the attorney's free speech.

The *Bates* case illustrates this method of constitutional analysis. There the state had attempted to impose a blanket rule against advertising upon a particular advertisement that exhibited no injury or threat of injury to the legitimate concerns of the state or the potential clients. The state made no claim that the advertisement contained any false, misleading or deceptive statements, or any elements of overreaching or misrepresentation. The only objections the state could bring to bear were the traditional but highly debatable propositions concerning (1) the supposed adverse effect of advertising on professionalism, (2) the supposed inherently misleading nature of attorney advertising, (3) the supposed adverse effect of advertising on the administration of justice, (4) the supposed undesirable economic effects of lawyer advertising, (5) the supposed adverse effect of advertising on the quality of legal service, and (6) the difficulties that might arise in enforcing any future limitations on misleading and decptive advertising. 97 S. Ct. at 2701-2707. The state, in other words, offered nothing more than the traditional arguments of the legal profession respecting advertising. Such arguments, such ethical considerations, simply did not qualify as the requisite compelling interests, thus leaving the particular advertisment in the commercial realm of free speech.

On the other hand, if the state can prove that the advertisement or solicitation in some way invades the legitimate interests and concerns of the state or the client, the lawyer's action may then lose its First Amendment shield. The lawyer has no First Amendment right to make false or misleading advertising claims. No does he have any First Amendment right to solicit legal business by making false or deceptive statements, or by using coercive or harassing techniques.

The constitutional sum of it all is that the lawyer's act of advertising or soliciting is presumptively an exercise of his free speech rights. That presumption cannot be overcome by resort to ethical arguments, many of which are highly questionable if not totally erroneous. The legal profession's historic sense of honor, its disdain for commercialism, simply cannot do battle with the deep and cherished values of the First Amendment. If all the state can say is that it is enforcing the profession's code of professional responsibility, a code that on its face condemns both the good and the bad forms of solicitation, the First Amendment presumption must prevail. In this sense, the free speech qualities of solicitation are in direct correlation with the professionally abstract qualities of the state's asserted concerns.

III. IN THIS CASE, THE STATE OF OHIO HAS ADVANCED NO COMPELLING INTEREST THAT OVERCOMES THE PRESUMPTION THAT THE SOLICITATIONS REFLECTED THE EXERCISE OF APPELLANT'S FIRST AMENDMENT RIGHTS.

This case is highlighted by the fact that the state, through its disciplinary authorities, has made no more serious a conclusion than that the appellant did make two solicitations of legal business. The state has done no more than apply the blanket solicitation proscriptions of DR 2-103(A) and DR 2-104(A) in an equally indiscriminate manner.

There has been no claim, and certainly no finding, that the appellant gave any advice or made any statement to Carol McClintock or to Wanda Lou Holbert that was false, fraudulent, misleading or deceptive. There has been no claim, and certainly no finding, that in making these solicitations the appellant used any coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct. Cf. the Proposal B revision of DR 2-104(A), 46 Law Week at 12. The critical finding of the Supreme Court of Ohio was that appellant violated DR 2-103(A) and DR 2-104(A) simply by "soliciting and obtaining agreements from Carol McClintock and Wanda Lou Holbert to represent each of them in their respective claims for damages arising out of the accident of February 2, 1974." J.S. App. 4a.

But to say merely that appellant solicited and obtained agreements is to concede that appellant was exercising his rights of free speech under the First Amendment. It will not do to label that exercise of free speech as mere solicitation. If Ohio has any more serious charge than solicitation to hurl at appellant it has yet to do so.

The record in this case is rich in detail, for it shows an attorney instinctively reacting to the misfortunes of two

acquaintances and freely offering his advice and services to their felt needs. The patent efforts of the two young clients to portray him as an "ambulance chaser," passing out his professional cards wholesale and proclaiming that he was a lawyer each time he entered the doorway, apparently fell on deaf ears below. And while the findings do have some serious factual errors, particularly in regard to time sequences (see pp. 10-14, *supra*), the ultimate finding as to solicitation is not in dispute. What is important, however, is that this ultimate finding puts the ultimate constitutional question – whether an attorney may be suspended from practice for having exercised his First Amendment right to solicit and obtain agreements from two clients in a benign manner. See pages 18 and 20-21, *supra*, as to the natural and friendly circumstances surrounding the two solicitations.

To repeat, DR 2-103(A) and DR 2-104(A) are blanket prohibitions of solicitation. They have been applied in this instance in an indiscriminate manner, to outlaw legitimate expressions of free speech and to destroy the reputation and livelihood of a lifetime lawyer. Not one legitimate state interest has been advanced to support such a result. Not one claim has been made that the interests of Carol McClintock and Wanda Lou Holbert were in any way harmed by appellant's vigorous and successful efforts to represent them.

As thus applied, DR 2-103(A) and DR 2-104(A) must be deemed to have violated appellant's free speech rights under the First Amendment.

CONCLUSION

For these reasons, the judgment below should be reversed.

Respectfully submitted,

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November 17, 1977